(32) (32)

Nos. 89-1391, 89-1392

IN THE

Supreme Court of the United States

October Term, 1990

DR. IRVING RUST, et al.,

Petitioners,

v.

LOUIS W. SULLIVAN, Secretary of Health and Human Services

THE STATE OF NEW YORK, et al.,

Petitioners,

v.

LOUIS W. SULLIVAN, Secretary of Health and Human Services

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF AMICI CURIAE OF THE NATIONAL RIGHT TO LIFE COMMITTEE, INC. AND THE CHRISTIAN LIFE COMMISSION OF THE SOUTHERN BAPTIST CONVENTION IN SUPPORT OF RESPONDENT

James Bopp, Jr.
Counsel of Record
Richard E. Coleson
Brames, McCormick, Bopp & Abel
191 Harding Avenue
P.O. Box 410
Terre Haute, Indiana 47808-0410
(812) 238-2421
Counsel for Amici Curiae

September 7, [illegible]

Graphics Ltd., Indianapolis, IN 46202

STATEMENT OF THE ISSUE DEALT WITH HEREIN

Do the DHHS regulations which require Title X funded family planning services to be separate from abortion services provided by a grant recipient sufficiently implicate the substantive due process abortion privacy right declared in *Roe v. Wade* so that *Roe v. Wade* should be expressly reconsidered in these cases?

TABLE OF CONTENTS

	Page
STATEMENT OF THE ISSUE DEALT WITH HEREIN	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iv
INTEREST OF THE AMICI	1
SUMMARY OF THE ARGUMENT	3
ARGUMENT	4
I. *Roe v. Wade* Is Sufficiently Implicated In These Cases to Trigger Express Reconsideration of That Case.	4
A. Roe v. Wade *Is Implicated in the Framing of the Issues.*	4
B. Roe v. Wade *Is Implicated in the Decisions of Lower Courts Concerning These Regulations.*	5
C. Roe v. Wade *Is Sufficiently Implicated for Reconsideration Under the Principles Employed by This Court in* Patterson v. McLean Credit Union.	5
D. *This Court Has a Duty to Give a Reasoned Legal Justification for Its Decisions.*	6
II. This Court Has Adopted a Standard of Review in Its Recent Abortion Decisions Which is Inimical to *Roe v. Wade.*	8
III. The Failure of This Court to Fulfill Its Duty to Expressly Declare What the Law Is With Regard to Abortion Has Lead to Chaos in the Law.	13
IV. Stare Decisis Does Not Prevent Reconsideration of *Roe v. Wade* In These Cases.	19

V. Therefore, This Court Should Expressly Reconsider *Roe v. Wade* In These Cases and, Upon Express Reconsideration, Overrule It.	23
CONCLUSION	26

TABLE OF AUTHORITIES

CASES: *Page*

Akron v. Akron Center for Reproductive Health, 462 U.S. 416 (1983) 6, 9-10, 14-15, 19

Arnold v. Board of Educ. of Escambia County, Alabama, 880 F.2d 305 (11th Cir. 1989) 17

Bowers v. Hardwick, 106 S.Ct. 2841 (1986) 22

Burnet v. Coronado Oil & Gas Co., 285 U.S. 393 (1932) 19

Cohens v. Virginia, 6 Wheat 264 (1821) 7

Doe v. Bolton, 410 U.S. 179 (1973) 2, 6

Florida Women's Clinic, Inc. v. Smith, No. 79-60603, slip op., (S.D. Fla. Aug. 1, 1990) 17

Guam Society of Obstetricians et al. v. Ada et al., No. 90-00013, slip op. (D. Guam Aug. 23, 1990) 16

Harris v. McRae, 448 U.S. 297 (1980) 4

Hodgson v. Minnesota, 110 S.Ct. 2926 (1990) ..... *passim*

In Re Air Crash Disaster at Detroit Metropolitan Airport on August 16, 1987, 747 F. Supp. 427 (E.D. Mich. 129.71989) 17-18

Lewis v. Pearson Foundation, Inc., [sic], slip op. (8th Cir. July 10, 1990) 17

Marbury v. Madison, 1 Cranch 137 (1803) 6-7

Massachusetts v. Secretary of Health and Human Services, 873 F.2d 1528 (1st Cir. 1989) 5, 17

Michael H. v. Gerald D., 109 S.Ct. 2333 (1989) 22

Moore v. East Cleveland, 431 U.S. 494 (1977) 22

New York v. Sullivan, 889 F.2d 401 (2d Cir. 1989) 5

Ohio v. Akron Center for Reproductive Health, 110 S.Ct. 2972 (1990) ..... *passim*

Patterson v. McLean Credit Union, 109 S.Ct. 2363 (1989) 5, 6, 7, 20-21

Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1976) 25

Planned Parenthood of Southeastern Pennsylvania et al. v. Casey et al., No. 88-3228, slip op. (E.D. Pa. Aug. 24, 1990) 16-20

Planned Parenthood v. Minnesota, 1990 W.L. 108384 (8th Cir. 1990) 16

Rodriquez de Quijas v. Shearson/American Express, Inc., 109 S.Ct. 1917 (1989) 18

Roe v. Wade, 410 U.S. 113 (1973) ..... *passim*

Runyon v. McCrary, 427 U.S. 160 (1976) 5

Simopolous v. Virginia, 462 U.S. 506 (1983) 24

Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747 (1986) 9-10, 21, 24

Webster v. Reproductive Health Services, 109 S. Ct. 3040 (1989) ..... *passim*

CONSTITUTION AND STATUTES:

42 U.S.C. § 1981 5

OTHER AUTHORITIES:

Benshoof, Kolbert, Paltrow & Pine, *Summary and Legal Analysis of* Webster v. Reproductive Health Services, BioLaw U:1497 (1989) 13

Blaustein & Field, *"Overruling" Opinions in the Supreme Court*, 57 Mich. L. Rev. 151 (1958) 20

Bopp & Coleson, *The Right to Abortion: Anomalous, Absolute, and Ripe for Reversal*, 3 B.Y.U. J. Pub. Law 181 (1989) 9, 11, 21, 23

Bopp & Coleson, Webster *and the Future of Substantive Due Process*, 28 Duq. L. Rev. 271 (1990) 23

Bopp & Coleson, *What Does* Webster *Mean?*, 138 U. Pa. L. Rev. 157 (1989) 13

Brief of Petitioners, *New York et al. v. Sullivan*, No. 89-1392 5

Brief of Petitioners, *Rust et al. v. Sullivan*, No. 89-1391 5

Congressional Research Service, *The Constitution of the United States, Analysis and Interpretation* & Supp. (1988) 12, 20

Dellapenna, Brief of the American Academy of Medical Ethics, as *Amicus Curiae*, *Minnesota v. Hodgson*, 110 S.Ct. 2926 (1990) (No. 88-1309) 22

Dellinger & Sperling, *Abortion and the Supreme Court: The Retreat from* Roe v. Wade, 138 U. Pa. L. Rev. 83 (1989) 8, 13

Maltz, *Some Thoughts on the Death of Stare Decisis in Constitutional Law*, 1980 Wis. L. Rev. 467 19

Robertson, *The Future of Early Abortion*, A.B.A. J., Oct. 1989, at 73 13

Nos. 89-1391, 89-1392

IN THE

Supreme Court of the United States

October Term, 1990

DR. IRVING RUST, et al.,

Petitioners,

v.

LOUIS W. SULLIVAN, Secretary of Health and Human Services

THE STATE OF NEW YORK, et al.,

Petitioners,

v.

LOUIS W. SULLIVAN, Secretary of Health and Human Services

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF AMICI CURIAE OF THE NATIONAL RIGHT TO LIFE COMMITTEE, INC. AND THE CHRISTIAN LIFE COMMISSION OF THE SOUTHERN BAPTIST CONVENTION IN SUPPORT OF RESPONDENT

INTEREST OF THE AMICI[1]

The National Right to Life Committee, Inc. is a nonprofit organization whose purpose is to promote respect for the worth

[1] This brief is filed with permission of all the parties. Letters of permission have been filed with the Clerk of this Court.

and dignity of all human life, including the life of the unborn child from the moment of conception. The National Right to Life Committee, Inc. is comprised of a Board of Directors representing 51 state affiliate organizations and about 3,000 local chapters made up of individuals from every race, denomination, ethnic background, and political belief. It engages in various political, legislative, legal, and educational activities to protect and promote the concept of the sanctity of innocent human life.

The members of the National Right to Life Committee, Inc. have been the prime sponsors of laws restricting abortion on demand to only those instances in which the mother's life is in danger. Since *Roe v. Wade*, 410 U.S. 113 (1973), and *Doe v. Bolton*, 410 U.S. 179 (1973), the members of the National Right to Life Committee, Inc. have supported legislation to protect unborn human life within these guidelines. The National Right to Life Committee, Inc. has advocated and encouraged new DHHS regulations to rid Title X funded family planning of the taint of abortion, in compliance with the intent of Congress not to fund programs where abortion is a method of family planning. The National Right to Life Committee, Inc. seeks to advance its interests by supporting the DHHS regulations at issue herein.

The Christian Life Commission of The Southern Baptist Convention is the agency of the Convention charged by the Convention with assisting Southern Baptists in understanding the moral demands of the Christian faith and helping Southern Baptists apply Christian principles to moral and social problems. The Southern Baptist Convention, the nation's largest Protestant denomination, with 38,000 member churches and 14.9 million church members, has assigned the Christian Life Commission of The Southern Baptist Convention the specific task of addressing issues such as abortion.

SUMMARY OF THE ARGUMENT

Roe v. Wade is sufficiently implicated in these cases for this Court to use this occasion to revisit its decision in *Roe v. Wade*. Examination of this Court's latest decisions in abortion cases reveals a reliance on an analysis inimical to that established in *Roe*. Therefore, *Roe* has been *sub silentio* reversed. While this Court has reconsidered and overruled *Roe sub silentio*, this Court's failure to do so expressly has resulted in chaos in the law. The lower courts do not know what standard to apply in reviewing legislation touching on abortion.

This Court has a constitutional duty to provide a reasoned legal justification for its decision, which requires it to expressly reconsider *Roe v. Wade* in these cases. The doctrine of stare decisis does not prevent this Court from performing this duty. Upon express reconsideration, *Roe v. Wade* should be overruled, for there is no fundamental right to abortion under the tests established by this Court for determining fundamental rights.

ARGUMENT

I. *Roe v. Wade* Is Sufficiently Implicated In These Cases to Trigger Express Reconsideration of That Case.

In these cases, the abortion privacy right declared in *Roe v. Wade*, 410 U.S. 113, is at issue.[2] This is clear (1) from the framing of the issues by Petitioners State of New York, et al., (2) from the decision of the First Circuit and other lower courts, which rely on *Roe v. Wade* in striking down these regulations, (3) from the principles employed by this Court in reconsidering precedent, and (4) from the constitutional obligation of this Court to give a sufficient legal rationale for its decisions.

A. Roe v. Wade *Is Implicated in the Framing of the Issues.*

That *Roe v. Wade* is at issue in the cases at bar is evident from the framing of the issues by Petitioners State of New York, et al.. The third issue stated by these Petitioners is:

> Does the regulations' prohibition of abortion counseling and referral in a Title X-funded program violate the woman's constitutionally protected privacy right to make a fully informed decision on whether or not to continue her pregnancy.

Brief of Petitioners at i (Issue 3), *New York et al. v. Sullivan*, No. 89-1392; *cf.* Brief of Petitioners at i (Issue 2), *Rust et al. v. Sullivan*, No. 89-1391.

The key to this issue is the presence or absence of a constitutional abortion privacy right. If there is no fundamental abortion privacy right, then the regulations herein are subject to the rational basis test. If such a right exists, as declared by *Roe*, then strict scrutiny is required. In this way, the standard of review of the regulations is determined.

[2] The abortion privacy right declared by *Roe* was found in the Fourteenth Amendment to the United States Constitution, which applies only to the states. A comparably worded due process clause is found in the Fifth Amendment, which applies to the federal government. The fact that this Court found within the Fourteenth Amendment due process clause an abortion right does not automati cally dictate that one must be found in the Fifth Amendment's liberty clause. The prior decision of this Court in which a distinction could have been made between these two clauses was *Harris v. McRae*, 448 U.S. 297 (1980). In that case, however, the issue was avoided. For present purposes, these two clauses will be treated as equivalent.

B. Roe v. Wade *Is Implicated in the Decisions of Lower Courts Concerning These Regulations.*

The issues of this case have been litigated in several federal jurisdictions. In the decisions of these courts, *Roe v. Wade* has been at issue. Although the Second Circuit found that the right declared in *Roe* was not violated by these regulations, *New York v. Sullivan*, 889 F.2d 401, 410 (2d Cir. 1989), the First Circuit held that the new regulations "constitute[] a government created obstacle in violation of *Roe v. Wade* and its progeny." *Massachusetts v. Secretary of Health and Human Services*, 873 F.2d 1528, 1545 (1st Cir. 1989).

Thus, the reach of *Roe v. Wade*, along with its continued vitality, is clearly at issue in these cases. Indeed, the very fact that this case involves abortion rights implicates *Roe v. Wade*, as discussed below, for there is no fundamental right to abortion without *Roe v. Wade*.

C. Roe v. Wade *Is Sufficiently Implicated for Reconsideration Under the Principles Employed by This Court in* Patterson v. McLean Credit Union.

Where a claimed violation of one's right is asserted, the presence or absence of that right is logically at issue. This precise logic guided this Court in its decision in *Patterson v. McLean Credit Union*, 109 S.Ct. 2363 (1989), to reconsider *Runyon v. McCrary*. 427 U.S. 160 (1976). In *Patterson*, the plaintiff brought an action based upon the statutory right created by an interpretation of 42 U.S.C. § 1981 in *Runyon*, i.e., that § 1981 encompasses a private contract between an employer and employee, and the Court found it appropriate to revisit the case that created that right in such a context.

The rule derivable from *Patterson* is that it is sufficient for reconsideration of a prior case if the right created by the prior case is the basis of the claim in a later case. This common-sense approach normally governs the Court in deciding when reconsideration is appropriate.

However, the majority which decided *Webster v. Reproductive Health Services*, 109 S. Ct. 3040 (1989), disagreed over whether and to what extent *Roe v. Wade* should be expressly reconsidered. The failure of a majority to agree to reconsider *Roe* was based upon an analysis contrary to that employed in *Patterson*. The result of this refusal to provide an adequate justification for its decision and thereby to declare what the law is in the area of abortion has left abortion law in chaos.

The abortion privacy right is fairly at issue in this case, and nothing is served by seeking to avoid the issue. Rather, a tremendous disservice would be done to the nation. Distinguishing the degrees of implication of a seminal case — one which creates the right or analysis under which the cause of action arose — is unnecessary. Such a seminal case is always fully implicated in a cause which invokes that right or analysis. Such distinguishing of degrees of implication was not engaged in in *Patterson*, nor is it appropriate under the principle that the decision of all matters necessary to a reasoned justification of the Court's decision — including establishment of the standard of review — is constitutionally necessary.

The result of the failure of the Court to employ a consistent analysis with regard to reconsideration has resulted in turmoil and confusion in abortion jurisprudence, as more fully set forth below. It further resulted in the failure of a majority of the Court to expressly address a decision, *Roe*, which five Justices have declared to be constitutionally flawed. *See, e.g., Roe*, 410 U.S. at 171 (Rehnquist, J. dissenting); *Bolton*, 410 U.S. at 179 (White, Rehnquist, J.J., dissenting); *Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 452 (1983) (O'Connor, White, Rehnquist, J.J. dissenting); *Webster*, 109 S.Ct. at 3054-58 (Rehnquist, C.J., joined by White and Kennedy, J.J., plurality opinion); *id.* at 3064 (Scalia, J.J., concurring in part and concurring in the judgment).

D. *This Court Has a Duty to Give a Reasoned Legal Justification for Its Decisions.*

"It is emphatically the province *and duty* of the judicial department to say what the law is." *Marbury v. Madison*, 1 Cranch 137, 177 (1803) (emphasis added). The duty to decide,

when constitutionally required, is illustrated by Justice Marshall in *Marbury*, where he felt compelled, in giving an adequate legal justification for his decision, to comment on matters not necessary to the decision of the case but necessary to a legal justification of the case. He wrote:

> The peculiar delicacy of this case, the novelty of some of its circumstances, and the real difficulty attending the points which occur in it, require a *complete exposition of the principles on which the opinion to be given by the Court is founded.*

Marbury, 1 Cranch at 154 (emphasis added).

To this comment must be added another of Justice Marshall's remarks in the case of *Cohens v. Virginia*, 6 Wheat 264 (1821):

> Questions may occur which we would gladly avoid; but we cannot avoid them. All we can do is to exercise our best judgment and conscientiously to *perform our duty.*

Id. at 404 (emphasis added).

The duty of the Court is to provide a sufficient legal justification for its ruling. The standard of review of a law — whether it is the rational basis test or strict scrutiny — is an essential, and therefore unavoidable, part of this Court's legal duty to provide a justification for its ruling. If a prior case has established one standard of review, but the Court is persuaded that the Constitution requires another, the prior case must necessarily be reconsidered; and if found contrary to the Constitution, overruled. Whether a fundamental abortion right exists — and is thereby implicated — determines the standard of review to be employed by the Court. If a prior case declares that such a fundamental right exists, but this Court is persuaded otherwise, the express reconsideration and overruling of that case is required. Only by establishing the presence or absence of a fundamental right, and the analysis derived thereby to be applied to the law at issue, does this Court provide the legal justification for its decision, which the Court is required by the Constitution to do.

The Nation presently needs this Court to clarify the state of abortion law, for, as noted in a later section, the lower courts do not even know what standard of review to apply to abortion cases. This is due to this Court's failure to provide a legal justification for its ruling in *Webster v. Reproductive Health Services*, 109 S.C. 3040, *Hodgson v. Minnesota*, 110 S.Ct. 2926 (1990), and *Ohio v. Akron Center for Reproductive Health*, 110 S.Ct. 2972 (1990). This duty should be fulfilled herein.

II. This Court Has Adopted a Standard of Review in Its Recent Abortion Decisions Which Is Inimical to *Roe v. Wade*.

On June 25, 1990, this Court handed down its latest decisions on abortion. These decisions, *Hodgson v. Minnesota*, and *Ohio v. Akron Center for Reproductive Health*, confirm the radical change in abortion jurisprudence indicated by this Court's decision in *Webster v. Reproductive Health Services*. This Court's decisions in *Hodgson* and *Ohio* demonstrate that a majority of this Court has now abandoned the key underpinning of the *Roe v. Wade* decision — that there is a general "fundamental right to abortion." By so doing, this Court has *sub silentio* overruled *Roe v. Wade*. But the Court has refused to make this clear by expressly reconsidering *Roe*.

The failure of this Court to say expressly what it is doing implicitly and to provide the necessary legal justification has triggered stinging criticism on the Court. Justice Blackmun, writing in his dissent in *Webster*, observed that the plurality has "gone about its business in . . . a deceptive fashion . . . [which] obscures the portent of its analysis." *Webster*, 109 S.Ct. at 3067 (Blackmun, Brennan, Marshall, J.J., concurring in part and dissenting in part). Commentators correctly point out that the *Webster* plurality "eviscerate[d] . . . without explaining what, if anything, was wrong with the decision." Dellinger & Sperling, *Abortion and the Supreme Court: The Retreat from* Roe v. Wade, 138 U. Pa. L. Rev. 83, 83-84 (1989). Thus, "[t]he Court's prevailing opinion . . . failed to meet the most minimal standards of sound judicial decisionmaking." *Id.* at 83.

The rationale employed by this Court in *Hodgson* and *Ohio* was dramatically different from that of *Roe v. Wade*. Under *Roe v. Wade*, this Court held that abortion is a fundamental right, meaning that the state must show a compelling state interest to regulate abortion. *See Akron v. Akron Center for Reproductive Health*, 462 U.S. at 420 n.1. The Court created a trimester scheme whereby it recognized a compelling interest in maternal health arising at the end of the first trimester and a compelling interest in "potential" human life arising at fetal viability. *Roe*, 410 U.S. at 162-63. Despite these compelling interests, the task of regulating abortions has proven extremely difficult. *See generally* Bopp & Coleson, *The Right to Abortion: Anomalous, Absolute, and Ripe for Reversal*, 3 B.Y.U. J. Pub. L. 181 (1989).

Prior to *Roe*, abortion was, at most, a "liberty interest" which meant that the state needed only to show a rational basis for any restriction on abortion, because abortion did not enjoy any special constitutional protection. *See Roe*, 410 U.S. at 172-73 (Rehnquist, J., dissenting). Chief Justice Rehnquist and Justice White dissented in *Roe v. Wade* on the grounds that abortion was not a fundamental right but only a liberty interest which was subject to the rational basis test. *Id.*; *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 788-97 (1986) (White, J., dissenting).

In *Webster*, Justice Kennedy joined Chief Justice Rehnquist and Justice White in the plurality opinion which declared that abortion was "a liberty interest protected by the Due Process Clause." *Webster*, 109 S.Ct. at 3058 (plurality opinion) (in contradistinction to a "fundamental right" or "limited fundamental constitutional right").

In *Hodgson* and *Ohio*, Justices Scalia and O'Connor joined with the *Webster* plurality in applying the rational basis test to uphold the Ohio parental notice statute, *Ohio*, 110 S. Ct. at 2977,[3], the Minnesota 48-hour waiting period, *Hodgson*, 110 S.

[3] The plurality employed the rational-basis test explicitly in several passages, *e.g.*, "the Legislature acted in a rational manner;" "It is both rational and fair;" and "The statute in issue here is a rational way to further those ends." *Id.* at 2983-2984.

Ct. at 2960 (Scalia, J., concurring in the judgment in part and dissenting in part); *id.* at 2944 (Stevens, O'Connor, J.J.) (the 48-hour waiting period "*reasonably* further[s] the *legitimate state interest* in ensuring that the minor's decision is knowing and intelligent." (emphasis added)), and the Minnesota two-parent notification requirement with a judicial bypass. *Hodgson*, 110 S. Ct. at 2949 (O'Connor, J., concurring in part and concurring in the judgment in part).

Thus, a new five-member majority has emerged on this Court, prepared to review and uphold abortion statutes under the rational basis test.[5] Because the analysis employed by the new abortion majority in *Hodgson* and *Ohio* (applying the low-level scrutiny) is inimical to *Roe v. Wade* (requiring strict scrutiny), *Roe* has, in fact, been supplanted and is implicitly overruled.

Justice Scalia would have expressly overruled *Roe* in *Webster*, 109 S. Ct. at 3064 (The plurality opinion "effectively

[5] While all members of the new abortion majority agree that there is no general fundamental right to abortion, Justice O'Connor recognizes a limited fundamental right to abortion where restrictions on abortion impose an "undue burden." *Akron*, 462 U.S. at 453. This triggers strict scrutiny in cases where such a burden exists. Justice O'Connor defines as undue those burdens arising from restrictions which impose "absolute obstacles or severe limitations on the abortion decision." *Id.* at 464. Even where there is an undue burden, leading to heightened scrutiny, Justice O'Connor recognizes compelling interests in protecting unborn life and maternal health throughout pregnancy. *Thornburgh*, 476 U.S. at 828 (O'Connor, J., dissenting). These would be sufficient to uphold abortion restrictions, even where an undue burden required strict scrutiny. Justice O'Connor explicitly employed this analysis in *Akron* to vote to uphold a 24-hour waiting period from the time when women received state-prescribed information about abortion and fetal development to the time when they could give consent:

> Assuming arguendo, that any additional costs are such as to impose an undue burden on the abortion decision, the State's compelling interests in maternal physical and mental health and protection of fetal life clearly justify the waiting period. . . . The decision . . . has grave consequences for the fetus, whose life the State has a compelling interest to protect and preserve. '[N]o other [medical] procedure involves the purposeful termination of a potential life.' *Akron*, 462 U.S. at 473-74 (O'Connor, J., dissenting) (citation omitted).

would overrule *Roe v. Wade* [citation omitted]. I think that should be done, but would do it more explicitly."), and then in *Hodgson*, 110 S.Ct. at 2961 ("I continue to dissent from this enterprise of devising an Abortion Code, and from the illusion that we have authority to do so."), and *Ohio*. 110 S. Ct. at 2984 (Scalia, J., concurring) ("The Court should end its disruptive intrusion into . . . [the abortion] field as soon as possible.").

The plurality of Chief Justice Rehnquist, and Justices White and Kennedy, voted to expressly overrule Roe's trimester scheme in *Webster*, 109 S.Ct. at 3056-58 (plurality opinion) (finding that the trimester division is "not found in the text of the Constitution or in any place else one would expect to find a constitutional principle" and that the state's interest in protecting unborn life "if compelling after viability, is equally compelling before viability," (quoting *Thornburgh*, 476 U.S. at 795 (White, J., dissenting)) and, thus, declaring that "[t]o the extent indicated in our opinion, we would modify and narrow *Roe* and succeeding cases."), but avoided *Roe* in *Hodgson* and *Ohio* by finding that these statutes were consistent with *Roe*'s progeny concerning parental notice and consent. 110 S. Ct. at 2978 (citing *Planned Parenthood of Central Missouri v. Danforth; Bellotti v. Baird; H.L. v. Matheson; Planned Parenthood Association of Kansas City, Mo., Inc., v. Ashcroft; Akron v. Akron Center for Reproductive Health, Inc.* (citations omitted)).

Justice O'Connor found "no necessity . . . to reexamine" *Roe* in *Webster*, because the statutes could be upheld under existing precedent, 109 S.Ct. at 3060-61, and in *Hodgson* and *Ohio* because she employed the rational basis test. To the extent that Justice O'Connor was relying upon her "unduly burdensome" test, in *Webster*, *id.* at 3063, she was directly "implicating" *Roe* because this Court in *Akron v. Akron Center for Reproductive Health* had held this test unconstitutional under *Roe*. *Akron*, 462 U.S. at 420 n.1. Furthermore, applying the rational basis test to uphold the *Hodgson* and *Ohio* statutes is clearly contrary to *Roe*, as the dissenters correctly pointed out. *Hodgson*, 110 S. Ct. at 2951; *Ohio*, 110 S. Ct. at 2984.

It is not unusual, however, for this Court to abandon prior precedent without expressly overruling it. Of the 184 cases

identified by the Library of Congress as having overruled prior precedent, it's researchers found that, "[w]hile the Supreme Court sometimes expressly overrules a prior decision, in a great many instances the overruling must be deduced from the principles" of the cases. Congressional Research Service, *The Constitution of the United States, Analysis and Interpretation* 2117-27 & Supp. (1988).

However, the Court's reluctance to say expressly what it is doing implicitly can leave the People, the legislatures, and even the courts uncertain of what course the Court is following. This is compounded when some dissenting Justices disingenously proclaim that "*Roe* remains the law of the land," *Hodgson*, 110 S. Ct. at 2952 (Marshall, J., concurring in part, concurring in the judgment in part, and dissenting in part); *see also Webster*, 109 S.Ct. at 3067 (Blackmun, J., concurring in part and dissenting in part) ("For today, at least, the law of abortion stands undisturbed." *Id.* at 3079.), while finding that the state abortion statutes, upheld by the Court, were unconstitutional under *Roe*. *Roe* clearly does not remain the law of the land.

One looks in vain for even a passing reference to *Roe v. Wade* in any majority opinion in *Hodgson* and *Ohio*. Only in the dissenting opinions of Justice Marshall (joined by Justices Brennan and Blackmun), in *Hodgson*, 110 S. Ct. at 2951, and Justice Blackmun (joined by Justices Brennan and Marshall), in *Ohio*, 110 S. Ct. at 2984, was *Roe v. Wade* even mentioned. In each case, the dissent explicitly reaffirmed *Roe* and applied its analysis to declare unconstitutional all provisions of the Minnesota and Ohio statutes. In these cases, the strict adherents to *Roe v. Wade* and its progeny numbered only three Justices.

The analysis used in *Roe v. Wade* has become virtually irrelevant in deciding abortion cases, because neither the heightened scrutiny employed by *Roe* for reviewing abortion restrictions affecting adult women nor the intermediate scrutiny required under *Roe* for restrictions affecting minors is being applied by the majority of this Court. The new analysis is the rational basis test — as if there is no fundamental right to abortion. Application of this lowest level of constitutional scrutiny to abortion restrictions is in direct contradiction of *Roe*.

III. The Failure of This Court to Fulfill Its Duty to Expressly Declare What the Law Is With Regard to Abortion Has Lead to Chaos in the Law.

The confusion resulting from *Webster* may be seen in the varying interpretations given to the opinion, which run along a spectrum from a *sub silentio* reversal of *Roe*, *see, e.g.*, Dellinger & Sperling, *Abortion and the Supreme Court: The Retreat from* Roe v. Wade, 138 U. Pa. L. Rev. 83 (1989); Bopp & Coleson, *What Does* Webster *Mean?*, 138 U. Pa. L. Rev. 157 (1989), to a *sub silentio* reversal of the trimester scheme and the Court's pronouncements in *Akron* and *Thornburgh*, *see, e.g.*, Robertson, *The Future of Early Abortion*, A.B.A. J., Oct. 1989, at 73, to a mere funding case with few other implications. *See, e.g.*, Benshoof, Kolbert, Paltrow & Pine, *Summary and Legal Analysis of* Webster v. Reproductive Health Services, BioLaw U:1497 (1989). In light of such diversity of possibilities, how may the legislatures act? What is permitted?

The significance of this change is in the standard of review now employed by the Court. Viewed as a fundamental right, strict scrutiny is employed and virtually no restriction on abortion is upheld.[6] However, when viewed only as a "liberty interest," as a majority of the Court now does,[7] abortion restrictions must only be rationally related to a legitimate state interest with the result that nearly all restrictions on abortion are constitutional. *See generally* Bopp & Coleson, *What Does* Webster *Mean?*, 138 U. Pa. L. Rev. 157 (1989).

---

[6] *See generally* Bopp & Coleson, *What Does* Webster *Mean?*, *supra*. *See also Webster*, 109 S.Ct. at 3068 n. 1 (Blackmun, J., concurring in part and dissenting in part); *Hodgson*, 110 S.Ct. at 2951 (Marshall, J., concurring in part, concurring in the judgment in part, and dissenting in part); *Ohio*, 110 S.Ct. 2984 (Blackmun, J., dissenting).

[7] *Webster*, 109 S.Ct. at 3058 (plurality opinion) (abortion characterized as "a *liberty interest* protected by the Due Process Clause, which we believe it to be." (emphasis added); *Hodgson*, 110 S.Ct. at 2949 (O'Connor, J., concurring in part and concurring in the judgment in part) ("This Court extended that *liberty* interest to minors . . ." (citations omitted) (emphasis added)).

Given that the Court has not stated this change in analysis in express language, will the states feel free to act upon it? The Court's lack of candor in stating expressly what it has done implicitly multiplies confusion in abortion jurisprudence and in the legislatures.

Similarly, the very nature of a woman's interest in choosing abortion is now unexplained. In *Roe*, the Court determined that a woman has a fundamental right to choose abortion, employing a substantive due process analysis. The *Webster* plurality declared that a woman has only a "liberty interest" in abortion under the Due Process Clause of the Fourteenth Amendment. *Webster*, 109 S.Ct. at 3058. Justice O'Connor, with her advocacy of the rational basis standard of review in most cases, agrees that there is no general fundamental right to abortion. *Akron*, 462 U.S. at 453 (O'Connor, J., dissenting). However, where there is an undue burden, she might find a fundamental right, evidenced by her requiring a compelling state interest to justify regulation of abortion in such cases. *Akron*, 462 U.S. at 453 (O'Connor, J., dissenting). Thus, there is now a majority of the Court which no longer believes that there is a general fundamental right to abortion.

In *Akron*, the Court found the unduly burdensome test to be an unconstitutional form of analysis, forbidden by the dictates of *Roe v. Wade* itself. *Akron*, 462 U.S. at 420 n.1. Logically then, any invocation of or reliance upon the unduly burdensome test would be in direct derogation of *Roe*. However, in *Webster*, Justice O'Connor readily relied upon this analysis to uphold the statutes at issue in *Webster* and to declare that all of the Missouri statute could be upheld under prior decisions of the Court, at the same time arguing that no prior abortion decision of the Court was sufficiently implicated for purposes of reconsideration. *Webster*, 109 S.Ct. at 3060. At a very minimum, however, the resurrection of the unduly burdensome test implicated *Akron* because it directly rejected a key holding of that decision.

Is the unduly burdensome test — as the lowest common

denominator of the current majority on abortion issues — the proper analysis to be employed by lower courts and legislatures? If *Akron* is indeed overruled *sub silentio*, is legislation such as that found in *Akron* and in *Thornburgh* now constitutional? This Court's decisions in *Hodgson* and *Ohio* indicate that the answer is yes. In *Hodgson* and *Ohio*, five Justices analyzed and upheld the parental notification statutes under a rational basis standard. *Hodgson*, 110 S.Ct. at 2927; *Ohio*, 110 S.Ct. at 2972. This is a dramatic transformation in the way abortion statutes have been reviewed by the Supreme Court.

A further problem arises if Justice O'Connor's lowest-common-denominator analysis is now the *de facto* analysis for review of abortion legislation. It has been generally thought, since *Roe*, that the fundamental rights analysis required the showing (1) that the state has a compelling interest and (2) that the legislation enacted is narrowly tailored to effect only the compelling interest. *Roe*, 410 U.S. at 155. But Justice O'Connor wrote in *Akron*:

> The Court has never required that state regulation that burdens the abortion decision be 'narrowly tailored' to express only the relevant state interest. In Roe, the Court mentioned 'narrowly drawn' legislative enactments, but the Court never actually adopted this standard in the Roe analysis. In its decision today, the Court fully endorsed the Roe requirement that a burdensome health regulation, or as the Court appears to call it, a 'significant obstacle' be 'reasonably related' to the state compelling interest. The Court recognizes that '[a] state necessarily must have latitude in adopting regulations of general applicability in this sensitive area.'

Akron, 462 U.S. at 467 n.11 (O'Connor, J., dissenting) (citations omitted and case names not italicized in original).

Which standard must abortion legislation now meet — must it be narrowly tailored or rationally related to a compelling interest?

In sum, *Webster*, *Hodgson*, and *Ohio* overturned the abortion jurisprudence established by *Roe*. The very core analysis of *Roe* has been drawn into question: as to the nature of the interest, as to the standard of review, as to the temporal extent of the states' compelling interests, and as to the second prong of the *Roe* analysis for legislation burdening a fundamental right — if indeed, there is yet a fundamental right. The Court has failed to state explicitly what it has done and has not given a reasoned justification for it. This failure alone is a compelling reason why this Court should proceed to perform its constitutional duty to provide such justification, which it avoided in *Webster*, *Hodgson*, and *Ohio*.

Another reason for this Court to proceed to a reconsideration of *Roe* is that the lower courts are already differing widely in their understanding of the standard of review in abortion cases. In *Planned Parenthood v. Minnesota*, 1990 W.L. 108384 (8th Cir. 1990) the Eighth Circuit remarked in its review of a fetal remains disposal statute, "Prior to *Webster*, we believe the statute would have been reviewed under the strict scrutiny standard . . . In *Webster*, however, the Supreme Court appears to have adopted a less rigorous standard of review than the strict scrutiny analysis . . ." *Id.* at 5.

By contrast, the United States District Court for the Territory of Guam made absolutely no mention of *Webster*, *Hodgson*, or *Ohio*, or the views of the current majority of the Justices of this Court in striking Guam's recently enacted abortion law. *Guam Society of Obstetricians et al. v. Ada et al.*, No. 90-00013, slip op. (D. Guam August 23, 1990). Rather, the Guam District Court merely relied on *Roe v. Wade* as if nothing had happened to affect that decision. *Id.* at 14.

The United States District Court for the Eastern District of Pennsylvania did take note of *Webster*, *Hodgson*, and *Ohio* in its recent opinion in *Planned Parenthood of Southeastern Pennsylvania et al. v. Casey et al.*, No. 88-3228, slip op. (E.D. Pa. Aug. 24, 1990). However, it concluded that abortion jurisprudence had not been altered in the least: "For now, at least,

the law of abortion remains undisturbed, because only the United States Supreme Court has the power to change it." *Id.* at 190. Thus the District Court reviewed Pennsylvania's comprehensive abortion legislation under strict scrutiny, requiring the State to show both a compelling state interest for its legislation and that the legislation was "narrowly tailored to the precise compelling interest at stake." *Id.* at 135.

The Pennsylvania District Court reached this conclusion by repeated reliance on the statements of the dissenters in *Webster*, *Hodgson*, and *Ohio* to the effect that *Roe* remained the law of the land. *Id.* at 132 n.29, 136, 138, 190-91. Moreover, the district court strongly advocated *Roe*'s abortion doctrine as proper, contrary to the views of the new majority on this Court concerning abortion, and rejected criticisms of *Roe* by Justices O'Connor and Scalia. *Id.* at 132 n.29, 190-91.

The Pennsylvania District Court opinion highlights in three further ways the need for this Court to make express what it has done implicitly. First, the court set forth a list of lower court decisions which declared that abortion law remained unaltered from the analysis of *Roe*:

> *Lewis v. Pearson Foundation, Inc.*, __F.2d __, __ (slip op. at 5) (8th Cir. July 10, 1990) (*Webster* and *Hodgson* both "recognized the continuing viability of *Roe v. Wade*" and, therefore, *Roe v. Wade* remains controlling); *Massachusetts v. Secretary of Health and Human Services*, 899 F.2d 53, 54 (1st Cir. 1990) ("The [*Webster*] Court relied upon and reaffirmed the holdings of *McRae* and *Maher v. Roe* . . . and upheld the validity of *Roe v. Wade*"); *Arnold v. Board of Educ. of Escambia County, Alabama*, 880 F.2d 305, 311 & n.6 (11th Cir. 1989) (reaffirming the principles of *Roe v. Wade* and concluding that *Webster* did not affect its decision); *Florida Women's Clinic, Inc. v. Smith*, No. 79-60603, slip op. at 2 S.D. Fla. Aug. 1, 1990) ("Defendants[']reading of *Webster* is simply wrong. *Webster* did not overrule or modify *Roe*"); *In Re Air Crash Disaster at Detroit Metropolitan Airport on*

> *August 16, 1987*, 747 F. Supp. 427, 429 (E.D. Mich. 1989) ("The *Webster* Court neither overturned *Roe* with respect to viability nor found as a matter of law that viability occurs at twenty weeks").

Id. at 136-37. This demonstrates the resistance of many lower courts to applying the analysis now employed by this Court in abortion cases until this Court explicitly states that the analysis of *Roe v. Wade* no longer applies.

Second, the Pennsylvania district court set forth a statement by this Court assertedly applicable to the state of abortion law, which will be a pattern for many lower courts hostile to the actions of this Court in *Webster*, *Hodgson*, and *Ohio*, as the Pennsylvania district court is. *Id.* at 190-91. These courts will refuse to follow the analysis employed by this Court in recent abortion cases without more express statements of this Court's rationale. This principle asserted by the Pennsylvania district court is that:

> If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.

Id. at 129 (quoting *Rodriquez de Quijas v. Shearson/American Express, Inc.*, 109 S.Ct. 1917 (1989)). Although the analysis applied by this Court in the most recent cases should control the analysis employed by lower courts, many lower courts will insist on applying *Roe*'s analysis until this Court makes express what is now implicit.

Third, the Pennsylvania district court struck down legislation which a majority of this Court now clearly would approve, as evidenced by prior opinions and by expressed analysis. For example, the Pennsylvania district court struck down a statute requiring a 24-hour waiting period from the giving of a woman's informed consent to the performance of the abortion. *Id.* at 142-44. The district court declared the issue "identical to

the issue addressed by the Supreme Court in *Akron*." *Id.* at 143. The Pennsylvania court, however, totally ignored the fact that Justice O'Connor, joined by Justices Rehnquist and White, dissented in that case, *Akron*, 462 U.S. at 474, and that Justice Scalia and Kennedy would apparently agree, judging by the analysis employed in opinions they have since authored and joined. Some courts will continue to ignore the law as expressed by a current majority of this Court on abortion issues until these views are set forth in a manner which lower courts cannot avoid.

IV. Stare Decisis Does Not Prevent Reconsideration of *Roe v. Wade* In These Cases.

In his dissent in *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393 (1932), Justice Brandeis declared the following:

> Stare decisis is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than it be settled right. This is commonly true even where the error is a matter of serious concern, provided correction can be had by legislation. *But in cases involving the Federal Constitution where correction through legislative action is practically impossible, this Court has often overruled its prior decisions.* The Court bows to the lessons of experience and the force of better reasoning, recognizing that the process of trial and error, so fruitful in the sciences, is appropriate also in the judicial function.

Id. at 406-410 (Brandeis, J., dissenting) (emphasis added).[8]

On numerous occasions since *Burnet*, this Court has exercised its liberty to review and reverse its decisions on constitu-

---

[8] Justice Brandeis identified 28 instances in which the Court had reversed or qualified its own prior reading of the Constitution. That number has at least tripled in the years since *Burnet*. *See* Maltz, *Some Thoughts on the Death of Stare Decisis in Constitutional Law*, 1980 Wis. L. Rev. 467, 467.

tional law.[9] The Library of Congress has identified, through 1986, 184 cases in which this Court has reversed its own prior rulings. Congressional Research Service, *The Constitution of the United States, Analysis and Interpretation*, 2115-2127, & Supp. (1987).

However, given the importance of stare decisis in the law, it is appropriate that the Court set forth a reliable standard for determining when reconsideration of precedent is justifiable. This was done recently in *Patterson v. McLean Credit Union*, 109 S.Ct. 2363, which stated:

> Our precedents are not sacrosanct, for we have overruled prior decisions where the necessity and propriety of doing so has been established. Nonetheless, we have held that 'any departure from the doctrine of *stare decisis* demands special justification.' We have also said that the burden borne by the party advocating the abandonment of an established precedent is greater where the Court is asked to overrule a point of statutory construction. Considerations of *stare decisis* have special force in the area of statutory interpretation, for here, *unlike in the context of constitutional interpretation*, the legislative power is implicated, and Congress remains free to alter what we have done.

Id. at 2370 (emphasis added) (citations omitted).

Unlike *Patterson*, reconsideration of *Roe v. Wade* involves constitutional interpretation rather than statutory interpretation. The burden borne in establishing the necessity of reconsideration is therefore diminished.

In *Patterson* the Supreme Court set out three standards, any one of which, if met, constitutes sufficient justification to

[9] Blaustein & Field, *"Overruling" Opinions in the Supreme Court*, 57 Mich. L. Rev. 151, 167, 184-194 (1958) (identifying sixty constitutional law decisions among ninety overrulings of prior Supreme Court decisions).

reconsider a judicial precedent. *Roe v. Wade* meets all three tests and is thus ripe for reconsideration in an appropriate case, such as the case at bar.

The *Patterson* standards are: (1) Whether the precedent has been "undermined by subsequent changes or development in the law;" (2) Whether the precedent is "a positive detriment to coherence and consistency in the law, either because of inherent confusion created by an unworkable decision," or "because the decision poses a direct obstacle to the realization of important objectives embodied in other laws;" or (3) Whether the precedent is "outdated and after being 'tested by experience, has been found to be inconsistent with the sense of justice or with the social welfare.'" *Patterson*, 109 S.Ct. at 2371 (citations omitted). Each of these tests applies positively to *Roe v. Wade*, indicating that reconsideration of that case is appropriate.

First, *Roe* has been undermined by subsequent changes in the law. Contributing to the undermining of *Roe* is the fact that, while claiming to follow *Roe*, the Supreme Court has systematically gutted *Roe* in order to provide for the desired result. *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. at 783 (Burger, C.J., dissenting) ("The extent to which the Court has departed from the limitations expressed in *Roe* is readily apparent."); Bopp & Coleson, *The Right to Abortion: Anomalous, Absolute, and Ripe for Reversal*, 3 B.Y.U. J. Pub. L. 157, 202-10 (1989). The doctrine of stare decisis presupposes a precedent with content to be followed. By emptying *Roe* of content, any appeal to stare decisis is now an appeal only to the skeletal concept that a woman may have an abortion whenever she desires, for whatever reason.

However, the undermining of *Roe* in the *Roe* progeny takes a secondary place to the important changes heralded by the Court's abortion decisions in *Webster*, *Hodgson*, and *Ohio*. As the changes wrought by this Court in these cases is discussed at length *supra*, it need not be recounted here.

The Court has also recently clarified the fundamental rights analysis and this clarification undermines the fundamental rights analysis in *Roe*. In *Bowers v. Hardwick*, 106 S.Ct. 2841 (1986), this Court, examining the history of state regulation of sodomy, concluded that there was no fundamental right to commit sodomy. The test used in *Bowers* was an historical one, that is, whether such conduct is "deeply rooted in this Nation's history and tradition." 106 S.Ct. at 2844 (quoting *Moore v. East Cleveland*, 431 U.S. 494, 503 (1977) (Powell, J., concurring)). Finding that homosexual sodomy had long been regulated by the states, the Court concluded that it did not constitute a fundamental right. *Id.* at 2844-46.

The historical case for the fundamentality of abortion is no more convincing than the historical case for sodomy. The majority in *Roe* relied heavily, and uncritically, on the work of Professor Cyril Means. 410 U.S. at 132-39. Means' history of abortion was neither objective[10] nor accurate. *See* Dellapenna, Brief of the American Academy of Medical Ethics, as *Amicus Curiae*, *Hodgson*, 110 S.Ct. 2926 (No. 88-1309). Had this historical test for fundamentality been scrupulously applied in *Roe*, no right to abortion could have been found. This being true, *Roe* should be revisited.

In *Michael H. v. Gerald D.*, 109 S.Ct. 2333 (1989), this Court considered whether a biological father (who is adulterous) has a constitutional right to visit his child born in an intact marriage. Using the historical test of *Bowers*, this Court held that there is no fundamental right to visitation in such a case, because states have historically presumed that a child born within a marriage is the product of that marriage and rejected visitation claims by adulterous fathers. Both *Michael H.* and *Bowers* reveal that a proposed fundamental right should be framed concretely and narrowly, rather than abstractly and

[10] The majority cited Means seven times during its depiction of the history of abortion — without noting that he was the general counsel of the National Association for the Reform of Abortion Laws (now the National Abortion Rights Action League).

broadly. *See* Bopp & Coleson, Webster *and the Future of Substantive Due Process*, 28 Duq. L. Rev. 271 (1990). Thus, the issue concerning abortion must be whether there is an historically protected and unregulated right to choose abortion, not whether there is an abstract right of privacy and whether one can construe such privacy broadly enough to encompass abortion. Under such a test, no fundamental constitutional right to abortion may be found.

Therefore, *Roe v. Wade* clearly falls within the first *Patterson* test justifying abortion. It likewise falls within the latter two tests. It is, second, "a positive detriment to coherence and consistency in the law" both because of "inherent confusion" in an "unworkable decision" and because it "poses a direct obstacle to the realization of important objectives embodied in other laws." *See generally* Bopp & Coleson, *The Right to Abortion: Anomalous, Absolute, and Ripe for Reversal*, 3 B.Y.U. J. Pub. L. 181 (setting forth at great length the ways in which *Roe* and abortion law are inconsistent with the rest of the law and limits the expanding protection afforded the unborn). Third, *Roe* is outdated in its failure to recognize the scientific evidence for the essential humanity of the unborn, and is contrary to the social welfare. *Id.*

V. Therefore, This Court Should Expressly Reconsider *Roe v. Wade* In These Cases and, Upon Express Reconsideration, Overrule It.

The chaos created by the failure of this Court to say expressly in *Webster*, *Hodgson*, and *Ohio* what it has done implicitly will continue until this Court provides the necessary legal justification for its decisions in recent abortion cases. The decision of this Court in *Roe v. Wade* has proven unsound and is in need of reversal. *See generally* Bopp & Coleson, *The Right to Abortion: Anomalous, Absolute, and Ripe for Reversal*, 3 B.Y.U. J. Pub. L. 181; Bopp & Coleson, Webster *and the Future of Substantive Due Process*, 28 Duq. L. Rev. 271 (1989). The cases at bar are appropriate vehicles, the timing is appropriate, and the need is urgent for reconsideration of *Roe v. Wade*.

Roe v. Wade was intended to settle the issue of abortion in American law. However, *Roe* has proven to be inherently difficult to apply in any consistent and principled manner. This fact is evident in *Roe*'s progeny, which have produced a growing body of intricate and arbitrary, judicially-created regulations surrounding the abortion decision. For example, a state may require second trimester abortions to be performed in clinics, *Simopolous v. Virginia*, 462 U.S. 506 (1983), but may not require that they be performed in hospitals. *Akron*, 462 U.S. at 459. A state may require a physician to assure that certain information be provided to a pregnant woman, *Id.* at 448, but may not require that the doctor himself provide the information. *Id.* at 449. The quantum of information a state may require to be provided has been severely circumscribed. *Thornburgh*, 476 U.S. at 759, 765. Prior to the decision in *Webster*, the Court struck down any meaningful attempt to codify the restrictions allowed in *Roe* and abandoned key elements of the *Roe* formula when convenient. Far from settling the debate, these subsequent decisions have multiplied confusion and spawned further unanswered questions.

Even the dissenting opinions of *Roe* supporters in recent cases demonstrate the inherent confusion created by *Roe*. In *Hodgson* and *Ohio*, three Justices explicitly reaffirmed *Roe* and claimed to apply its analysis to declare unconstitutional all provisions of the Minnesota and Ohio statutes. *Hodgson*, 110 S.Ct. at 2951 (Justice Marshall, with whom Justices Brennan and Blackmun join, concurring in part, concurring in the judgment in part, and dissenting in part); *Ohio*, 110 S.Ct. at 2984 (Justice Blackmun, with whom Justices Brennan and Marshall join, dissenting). While these three Justices vigorously defended *Roe*, Justices Marshall and Blackmun differ dramatically on the standard of review that *Roe* requires. Justice Marshall declared that "[n]either the scope of a woman's privacy right nor the magnitude of a law's burden is diminished because a woman is a minor." *Hodgson*, 110 S.Ct. at 2952. Therefore, "state laws limiting that right [are subject] to the most exacting scrutiny, requiring a State to show that such a

law is narrowly drawn to serve a *compelling interest.*" *Id.* (emphasis added).

Justice Blackmun, on the other hand, claimed that "the Court has recognized that the State 'has somewhat broader authority to regulate the activities of children than of adults,' [but] in doing so, the State nevertheless must demonstrate that there is a '*significant state interest* in conditioning an abortion . . . that is not present in the case of an adult.'" *Ohio*, 110 S.Ct. at 2984 (emphasis in original) (quoting *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 74-75 (1976)). Thus, Justice Marshall employed strict scrutiny for minors and Justice Blackmun applied an intermediate standard. Both joined each other's opinion; Justice Brennan joined both opinions. Justice Brennan also joined Justice Steven's opinion, thereby subscribing to three standards of review simultaneously. One is at a loss to understand which analysis is required by *Roe*. Thus, the confusion in the law caused by *Roe v. Wade* is demonstrable from both the majority opinions in *Hodgson* and *Ohio* and the dissenting opinions of those that adhere to *Roe*. This Court needs to explain what the law is with regard to abortion.

CONCLUSION

Under the principles previously employed by this Court, *Roe v. Wade* is sufficiently implicated in these cases to use this occasion to reconsider *Roe v. Wade*. Indeed this Court has a constitutional duty to declare what the law is with regard to abortion and to give a full legal justification for its decisions, including an explanation of the applicable standard of review to be used in abortion cases.

Examination of this Court's latest decisions in abortion cases reveals that *Roe* has already been *sub silentio* reversed by employment of an analysis inimical to *Roe*. However, this Court's failure to expressly reconsider and overrule *Roe* has resulted in chaos in the law. The lower courts are applying different standards of review than the analysis used by this Court in its most recent abortion cases.

Upon reconsideration, *Roe* should be reversed. Employing substantive due process analysis, as it has been recently employed by this Court, and accurately portraying the long history of abortion restriction and regulation in this Nation, precludes any finding of a fundamental abortion right in the Constitution of the United States. Therefore, this Court should fulfill its duty to declare what the law is, and *Roe v. Wade* should be expressly reconsidered and overruled in these cases.

Respectfully submitted,

JAMES BOPP, JR.
Counsel of Record

RICHARD E. COLESON
Brames, McCormick, Bopp & Abel

191 Harding Avenue
PO. Box 410
Terre Haute, Indiana 47808-0410
(812) 238-2421
Counsel for Amici Curiae

September 7, 1990